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No. 84-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD PARKS, et al.,

Cross-Petitioners,

vs.

MICHAEL A. BELLETIRE, et al.,

Cross-Respondents.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether retroactive monetary damages are a part of the "appropriate relief" which may be granted against a State under the EHA, 20 U.S.C. § 1415(e)(2), or whether such damages are barred by the eleventh amendment.

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ARGUMENT

RETROACTIVE MONETARY DAMAGES AGAINST A STATE UNDER THE EHA ARE BARRED BY THE ELEVENTH AMENDMENT

The Seventh Circuit's refusal to award retroactive monetary damages in this case does not "conflict directly" with this Court's recent decision in *Burlington School Committee of Town of Burlington Massachusetts v. Dept. of Education*, ____ U.S. ____, 105 S. Ct. 1996 (1985). While it is true that *Burlington School Committee* holds that damages can be appropriate relief under the EHA, it does not address the issue of whether such damages would be barred by the eleventh amendment—an issue

not relevant in that case because damages were only awarded against the town of Burlington.

The question whether an award of damages is barred by the eleventh amendment is completely separate from the question of whether a damages award is authorized. *Cf. Campbell v. Talladega County Bd. of Education*, 518 F. Supp. 47, 56-57 (N.D. Ala. 1981) (damages awardable under § 504 of the Rehabilitation Act but barred by impossibility of measurement and by eleventh amendment). School boards of smaller political subdivisions, such as counties or cities, do not occupy the same position as a State for eleventh amendment purposes. *Mount Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974). The eleventh amendment therefore does not preclude the award of damages against such school districts. Accordingly, this Court's recent decision in *Burlington School Committee* could not be controlling on this issue.

Moreover, this Court has already found that the EHA was enacted pursuant to Congress' authority to legislate under the spending power, *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 190 n. 11, 204 n. 26 (1982), so it could not properly be viewed as a congressional waiver of the States' eleventh amendment immunity. Congress may abrogate this immunity under § 5 of the fourteenth amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but this legislation was not enacted to enforce the fourteenth amendment.

Additionally, it is well settled that abrogation of a State's immunity will not be implied, but must be clearly and unequivocally expressed, as evidenced by language in the statute or persuasive legislative history. *Quern v.*

Jordan, 440 U.S. 332, 345 (1979). Even assuming *arguendo* that the EHA was passed pursuant to the fourteenth amendment, there is no evidence that this Act was intended by Congress to waive the states' immunity from retroactive damage awards. Therefore, the EHA did not waive Illinois' eleventh amendment immunity, which barred the retroactive monetary relief sought by the plaintiffs in this case.

CONCLUSION

For the foregoing reasons the Respondents submit that this Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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